

FILED

Paycom Billing Svcs., Inc. v. Payment Resources Int'l, Inc., No. 04-55409

DEC 21 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

BERZON, Circuit Judge, dissenting in part:

I would hold that Paycom Billing Services, Inc. (“Paycom”) adequately raised below the argument that IBM Corp. (“IBM”) was directly liable for its own actions and would therefore reach the merits of the district court’s grant of summary judgment for IBM. Paycom’s opposition to summary judgment contained a heading stating, “Paycom Was Directly Injured by IBM Employees Working for IBM’s SDF and Global Solutions Business Unites in the Processing of Its Credit Card Transactions.” Beneath that heading and again in the body of the argument, Paycom cited evidence and argued that IBM employees or IBM-Denmark employees acting on behalf of IBM had been directly involved in the transactions at issue.

On the merits of the summary judgment, I would find that the district court abused its discretion in denying Paycom’s Fed. R. Civ. P. 56(f) motion. Discovery as to Paycom’s claims against IBM had been open for only two months at the time of the discovery cut-off. The record indicated that Paycom had been sufficiently diligent in pursuing discovery during that time period. Paycom’s failure to obtain discovery from IBM during this period had more to do with IBM’s refusal to make initial disclosures or answer discovery requests than with any lack of diligence on

the part of Paycom. After Paycom amended the complaint to add IBM as a defendant, IBM sought and received a number of extensions of the deadline for making initial disclosures pursuant to Fed. R. Civ. P. 26(a) while it filed motions to dismiss. When it finally made its initial disclosures on February 17, 2003, less than two months before the discovery cutoff, IBM produced not a single document. Nor did it produce any documents in response to 119 document requests propounded by Paycom, although its written responses promised to do so. Most significantly IBM did not disclose the identity of Gilbert Saenz, the sole witness relied on by IBM in support of its summary judgment motion. In response to IBM's inadequate initial disclosures and discovery responses, Paycom filed two motions to compel which were pending when the district court ruled on IBM's motion for summary judgment.

Given this context, Paycom's Rule 56(f) affidavit identified with sufficient specificity facts which would preclude summary judgment. In addition, the affidavit adequately demonstrates how the discovery sought would preclude summary judgment. Accordingly, in my view, it was an abuse of discretion for the district court to rule on IBM's summary judgment motion without permitting Paycom to proceed with outstanding discovery which was clearly relevant to these issues.

I therefore respectfully dissent.